No. 17-961

In The
Supreme Court of the United States

THEODORE H. FRANK and
MELISSA ANN HOLYOAK,

Petitioners,

v.

PALOMA GAOS, on behalf of herself and
all others similarly situated, et al.,

Respondents.

**On Writ Of Certiorari To The
United States Court Of Appeals
For The Ninth Circuit**

BRIEF OF MANHATTAN INSTITUTE FOR POLICY RESEARCH AS AMICUS CURIAE SUPPORTING PETITIONERS

C. THOMAS LUDDEN
Counsel of Record
KAREN A. SMYTH
LIPSON NEILSON P.C.
3910 Telegraph Road, Suite 200
Bloomfield Hills, Michigan 48302
(248) 593-5000
tludden@lipsonneilson.com

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

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STATEMENT OF INTEREST[1]

Amicus curiae Manhattan Institute for Policy Research was established in 1978 as a nonpartisan public-policy research foundation developing ideas that foster economic choice and individual responsibility. For more than 30 years, the Institute's legal-policy scholars have sought to develop and communicate novel, sound ideas on how to improve the civil- and criminal-justice systems.

Class action litigation has been a longstanding focus of the Institute's legal-policy research. Books by former Institute senior fellow Walter Olson and former Institute visiting scholar Lester Brickman, also of Cardozo Law School, extensively chronicled the problems with class-action practice. *See generally* Walter K. Olson, *The Litigation Explosion: What Happened When America Unleashed the Lawsuit* (Truman Talley Books 1991); and Lester Brickman, *Lawyer Barons: What Their Contingency Fees Really Cost America* (University of Cambridge Press 2011). A series of Manhattan Institute reports by Brickman, Richard A. Epstein, and John H. Beisner offered theoretical and empirical analyses that laid the intellectual groundwork for the Class Action Fairness Act of 2005, Pub. L. No. 109-2, 119 Stat. 4-14.

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[1] Petitioners and Respondents have consented to the filing of this brief. No counsel for a party authored this brief in whole or in part, and no person or entity other than amicus or their counsel contributed monetarily to the preparation or submission of this brief.

In addition to the Manhattan Institute's policy interest in the subject matter underlying this case, the Institute's legal scholars believe that enforcing clear legislative mandates is central to the rule of law and that class action *cy pres* awards, among other aspects of modern class action practice, violate the Rules Enabling Act.

The Amicus is submitting this brief in support of the Petitioners.

SUMMARY OF ARGUMENT

Federal courts have imported the *cy pres* remedy from the supervision of charitable trust into the administration of class actions. Congress has only authorized the federal courts to use this power in one, narrowly defined, type of class action settlement. Otherwise, the Rules Enabling Act, 28 U.S.C. § 2072, expressly prevents federal courts from using Federal Rules of Civil Procedure 23 to "abridge, enlarge or modify any substantive right" of the class members by substituting the *cy pres* remedy for the remedy created by the applicable substantive law. By approving a settlement that allows Respondent Google to discharge its liability to all class members by making *cy pres* payments to charities instead of compensatory payments to the class members, the courts below have effectively modified the substantive legal rights of the class members. Therefore, this Court should reverse the judgment below and hold that federal courts cannot use the

cy pres remedy in any case in which they are not expressly authorized by the existing substantive law to use this remedy.

INTRODUCTION

All federal courts have limited jurisdiction and powers. Therefore, litigants must demonstrate that a federal court has the jurisdiction to decide a case before the court will make a substantive decision. Sup. Ct. R. 14(1)(e); Fed. R. App. P. 28(a)(4); Fed. R. Civ. P. 8(a)(1). The Petitioners and the other amici raise many valid concerns about how the *cy pres* remedy is being used in this and other class action litigation. Before considering any of these objections, however, this Court should first decide if federal courts are ever authorized to use the *cy pres* remedy in class action litigation. *See Marek v. Lane*, 571 U.S. 1003 (2013) (Chief Justice concurring in denial of writ of petition for certiorari to review because the challenge to the Facebook settlement "might not have afforded the Court an opportunity to address more fundamental concerns surrounding the use of [*cy pres*] remedies in class action litigation, including when, **if ever**, such relief should be considered. . . .").

The Court should find that the answer to this threshold question is effectively "never" because federal courts are prohibited from substituting a *cy pres* remedy for the remedies established by the substantive law. Therefore, this Court should reverse the

judgment below and find that federal courts cannot use the *cy pres* remedy to distribute the proceeds from class action settlements or judgments unless the substantive law authorizes them to do so.

STATEMENT OF FACTS

Plaintiff-Respondent Pamela Gaos filed her original Complaint in the Northern District of California on October 25, 2010. (Joint Appendix, p. 1). Her original pleading attempted to state seven causes of action, which were based upon the alleged violation of federal statutes, California statutes and the California common law. (*Id.*, p. 18). Ms. Gaos was granted leave to amend her pleadings when Respondent Google, LLC successfully moved to dismiss her original complaint for failure to state a claim on which relief could be granted. (*Id.*, p. 22). In her Amended Complaint, Ms. Gaos modified her claims and alleged a different set of violations of statutory duties and common law torts. (*Id.*, p. 25). Google moved to dismiss once again for the failure to state a claim on which relief could be granted, and Ms. Gaos was permitted to file a Second Amended Complaint. (*Id.*, p. 31).

The lawsuit filed by Ms. Gaos was not the only putative class action lawsuit alleging that Google had violated the Stored Communications Act. On April 30, 2013, her lawsuit was consolidated with a second lawsuit that had been filed by Gabriel Priyev against Google. (Joint Appendix, p. 85). A Consolidated

Complaint was attached as Exhibit A to the Order of Consolidation and became the "operative complaint." (Order, p. 4 of 56, ¶ 10). This Consolidated Complaint contained the following causes of action:

> Count I – Violation of the Stored Communications Act, 18 U.S.C. § 2702
>
> Count II – Breach of Contract
>
> Count III – Breach of Contract of Good Faith and Fair Dealing
>
> Count IV – Breach of Contract Implied in Law
>
> Count V – Unjust Enrichment (In the Alternative)

In re Google Referrer Header Privacy Litigation, 869 F.3d 737, 739-740 (9th Cir. 2017). *See also* Order Granting Motion for Preliminary Approval of Class Certification. (Joint Appendix, p. 84).

After a mediation, the named parties reached a settlement, which requires Google to pay a total of $8.5 million. 869 F.3d at 740. Although Google agreed to provide additional information on its website, the settlement did not require Google to change any of its practices. *Id.* Of this sum, $3.2 million was for attorney fees, administration costs and incentive payments to the named plaintiffs. *Id.* The remaining $5,300,000 was to be paid to six *cy pres* recipients. *Id.* None of the allegedly injured persons would receive a penny, with the exception of the three named plaintiffs, who receive $5,000 each as class representatives. *Id.* at 741. In

return, Google would receive a full release of the claims by all members of the class. *Id.* at 740.

The class in this case is estimated at 129 Million. 869 F.3d at 740. Therefore, the notice requirements were unusual. Instead of providing notice directly to each class member, "[n]otice was given to the class by a website, a toll-free telephone number, paid banner ads, and press articles." *Id.* The settlement was approved by the federal district court, and the Ninth Circuit affirmed its decision. *Id.* at 739, 741.

ARGUMENT

The *cy pres* remedy has a long history of being used to handle charitable gifts and trusts that have become impossible to administer in accordance with their express terms. Some federal courts have concluded that it is also an effective remedy for problems that arise during class actions. But the Rules Enabling Act prohibits the use of the federal rules to substitute the *cy pres* remedy for the remedies authorized by statute or the common law. Therefore, unless this remedy is expressly authorized by the controlling substantive law, this Court should hold that federal courts cannot use the *cy pres* remedy in class action settlements or to dispose of any unclaimed portion of class action judgments.

A. American state courts having jurisdiction over charitable trusts are expressly authorized by state statutes to use the *cy pres* remedy in a limited set of circumstances.

When it affirmed the district court decision approving the use of *cy pres* payments in settlement of this case, the Ninth Circuit explained the origins of this remedy and its use in class actions as follows:

> *Cy pres*, which takes its name from the Norman French expression *cy pres comme possible* (or "as near as possible"), is an equitable doctrine that originated in trusts and estates law as a way to effectuate the testator's intent in making charitable gifts. *Nachshin v. AOL, LLC*, 663 F.3d 1034, 1038 (9th Cir. 2011). In the class action settlement context, the *cy pres* doctrine permits a court to distribute unclaimed or non-distributable portions of a class action settlement fund to the "next best" class of beneficiaries for the indirect benefit of the class. *Id.*

869 F.3d at 741. The Seventh Circuit has explained that "Th[e *cy pres*] doctrine is based on the idea that the settlor would have preferred a modest alteration in the terms of the trust to having the corpus revert to his residuary legatees. So there is an indirect benefit to the settlor." *Mirfasihi v. Fleet Mortg. Corp.*, 356 F.3d 781, 784 (7th Cir. 2004).

In England, the Chancellor had a supervisory role over charitable trusts and could use his broad equitable powers to prevent charitable trusts from

completely failing. Hamish Gray, *The History and Development in England of the Cy-Pres Principle in* Charities, 33 B.U. L. Rev. 30, 32 (1953); Edith Frisch, *The Cy Pres Doctrine in the United States*, § 2.01 (Mathew Bender 1950). Parliament also enacted the Statute of Charitable Uses, which partially codified and reformed the use of *cy pres* in the English Courts of Chancery. Gray, 33 B.U. L. Rev. at 35. Many American states were initially hesitant to adopt *cy pres*. Frisch, § 2.01. Over time, however, most state courts having jurisdiction over charitable trusts were authorized to use the *cy pres* remedy when the purpose of the trust has been frustrated. *Id.*, §§ 2.00 et seq.

One example is the Michigan Estates and Protected Individuals Code ("EPIC"),[2] which governs charitable trusts. Mich. Comp. Laws § 700.7405. EPIC expressly authorizes the Probate Court to use *cy pres* "if a particular charitable purpose becomes unlawful, impracticable, or impossible to achieve, no alternative taker is named or provided for, and the court finds the settlor had a general, rather than a specific, charitable intent. . . ." Mich. Comp. Laws § 700.7413(1). Under these circumstances, a Michigan Probate Court may "modify or terminate the trust by directing that the trust property be applied or distributed, in whole or in part, in a manner consistent with the settlor's general

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[2] These sections of EPIC related to the *cy pres* remedy are based upon the Uniform Trust Code, which has been adopted by 32 states and the District of Columbia. http://uniformlaws.org/LegislativeFactSheet.aspx?title=Trust%20Code (last visited July 8, 2018).

charitable intent." Mich. Comp. Laws § 700.7413(1)(c). In addition, EPIC also allows the settlor to create a trust that the Probate Court is not permitted to modify using *cy pres*. Mich. Comp. Laws § 700.7413(2). Other states have similar statutory authorization and limitations.[3]

In summary, the *cy pres* remedy is an equitable remedy that was designed to handle the unique problems that arise when administering charitable gifts or trusts that long outlive their settlors. This remedy may only be used when specific conditions are met, and the settlor has chosen not to prevent its use to modify the express intent of the trust.

B. Federal courts are not authorized to use the *cy pres* remedy in class action litigation unless that use is specifically authorized by the controlling substantive law.

Unlike state courts having jurisdiction over charitable trusts, federal courts lack the statutory authorization to use the *cy pres* remedy, with one very narrow exception discussed below. Instead, they are expressly prohibited from using the federal rules to substitute the *cy pres* remedy for the remedies created by the substantive law. But, in this and many other cases, that is exactly what the federal courts are doing. Therefore, this Court should find that federal courts are not

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[3] *See, e.g.*, Cal. Prob. Code § 15409 (2016); Mass. Gen. Laws ch. 214, § 10B; N.Y. Est. Powers & Trusts § 8-1.1(c)(1); and 20 Pa. Cons. Stat. § 7740.3 (2016).

permitted to use the *cy pres* as a remedy in class action litigation unless that remedy is expressly authorized by controlling legal authority.

1. Federal courts have used their equitable powers to import the *cy pres* remedy into the administration of class action litigation.

Cy pres payments are now frequently used in the administration of federal class actions. Before adopting the *cy pres* remedy for class actions, however, the federal courts barely mentioned *cy pres* at all. A July 6, 2018 search of the Westlaw All Federal database identified 1458 cases in which the phrase "*cy pres*" appears. Only 125 of these cases were decided before 1978. In many of the 19th century cases, the phrase was mentioned, but was not the basis or the decision. *See, e.g.*, *Loring v. Marsh*, 15 F. Cas. 905, 907, 908, 914 (D. Mass. 1865) (counsel's argument referenced *cy pres*, but Court did not apply doctrine). In others, federal courts discussed *cy pres* because an issue of state law had arisen. *See, e.g.*, *John v. Smith*, 102 F. 218, 221-224 (9th Cir. 1900). In a substantially similar manner, federal courts have occasionally used *cy pres* to determine how to handle the assets of charitable trusts whose express purposes were barred by the Fourteenth Amendment. *See, e.g.*, *Wachovia Bank & Trust Co. v. Buchanan*, 346 F. Supp. 665, 667-668, 671 (1972) (applying *cy pres* after determining that it was unlawful for North

Carolina public officials[4] to administer testamentary trust to provide scholarships to the University of North Carolina for "white boys and girls").

The post-1978 explosion in the number of federal cases using the phrase "*cy pres*" results from the remedy being used in class action lawsuits. The decision to import the *cy pres* remedy into class actions is generally attributed to a 1972 law review comment, which suggested that courts use this remedy to distribute class action proceeds that were not collected by class members. This comment recommended that the "court may seek to apply their own version of cy pres by effectuating as closely as possible the intent of the legislature in providing the legal remedies on which the main cause of action was based." Stewart R. Shepherd, *Damage Distribution in Class Actions: The Cy Pres Remedy*, 39 U. Chi. L. Rev. 448, 452 (1972). The 1972 comment does not identify any legal authority that would allow federal courts to use this remedy.

Soon afterwards, federal courts began to evaluate whether to use the *cy pres* remedy in class actions. One of the first federal court decisions approving a settlement that applied the *cy pres* remedy was *Miller v. Steinbach*, No. 66 CIV. 356, 1974 WL 350 (S.D.N.Y. Jan. 3, 1974). *Miller* was a shareholder's derivative suit that was certified as a class action. *Id.* at *1. The parties reached a settlement in which all of the net

[4] There was a Fourteenth Amendment issue because almost all the members of the administrative group that selected the scholarship recipients were persons holding state elective or appointed public office. 346 F. Supp. at 667.

settlement proceeds, after paying approved costs and fees, would be paid to the Trustee of the retirement plan of the entity on whose behalf the stockholder's derivative suit was being pursued. *Id.* at *2. In deciding whether it could approve the settlement, *Miller* found that:

> As to any legal prohibition, while neither counsel nor the Court has discovered precedent for the proposal – at least in a case such as this where distribution to the class of plaintiffs was theoretically possible if not in a practical sense feasible – nor have we been made aware of any precedent that would prohibit it.

Id. at *2. Having concluded that it was not prohibited from doing so, *Miller* approved the settlement because it was "fair and reasonable." *Id.*

There are many subsequent federal court decisions considering whether the *cy pres* remedy should be used. Like *Miller*, these cases provide no more than minimal discussion of the authority that allows them to award this relief. For example, in *Van Gemert v. Boeing Co.*, 739 F.2d 730, 756-758 (2d Cir. 1984), the court reviewed the potential use of *cy pres* in the distribution of the unclaimed portion of a class action judgment. *Van Gemert* held that two statutory provisions[5] did not control the distribution of the unclaimed funds. *Id.* at 735-736. Instead, the district court was found to have "broad discretionary powers in shaping equitable decrees." *Id.* at 737. Ultimately, *Van Gemert* affirmed the

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[5] 28 U.S.C. §§ 2041-2042.

district court decision not to use *cy pres*, but instead to return the unclaimed portion of the judgment to the defendant, Boeing. *Id.* at 736-738.

In *Powell v. Georgia-Pacific Corp.*, 119 F.3d 703, 706-707 (8th Cir. 1997), the circuit court affirmed the district court decision to use *cy pres* to distribute unclaimed funds from a class action settlement. In reaching this decision, *Powell* held – without citing any authority – that "the [district] court correctly turned to traditional principles of equity to resolve the case." *Id.* at 706. It then relied upon a treatise[6] to find that *cy pres* remedy was one of the four ways that the district court could have exercised its discretion to disburse the uncollected funds. *Id.* Subsequent circuit court decisions have relied upon the prior decisions from other circuits as the authority for finding that the *cy pres* remedy may be used. *See, e.g., In re Pharmaceutical Industry Average Whole Price Litigation*, 588 F.3d 24, 33-35 (1st Cir. 2009) (approving use of *cy pres* in class action settlement); and *Masters v. Wilhelmina Model Agency, Inc.*, 473 F.3d 423, 436 (2d Cir. 2007) (explaining when *cy pres* distributions may be used).

Therefore, the only federal courts that have considered the original authority for federal courts to use the *cy pres* remedy have relied upon the general equitable authority of district courts to administer remedies.

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[6] 2 Newberg and Conte, *Newberg on Class Actions* § 10.15 at 10-38, 10-39 (3d ed.).

2. The Rules Enabling Act prevents Rule 23 from being used to modify the remedies authorized by substantive law.

The English Chancellor possessed broad equitable powers. American state courts are expressly authorized to use the *cy pres* remedy as part of their supervisory authority over charitable trusts. Federal courts not only lack the same express authorization to use broad equitable remedies, but they are also prohibited by the Rules Enabling Act from using procedural devices to modify the controlling substantive law.

Indeed, this Court has recognized that "Rule 23's requirements must be interpreted in keeping with Article III's constraints, and with the Rules Enabling Act, which instructs that rules of procedure 'shall not abridge, enlarge or modify any substantive right.' 28 U.S.C. § 2072(b)." *Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 613 (1997). "As nothing more than a Federal Rule of Civil Procedure, however, the class action device [Rule 23] may do no more than enforce existing substantive law as promulgated either by Congress or, in diversity suits, by applicable state statutory or common law." Martin Redish, *Cy Pres Relief and the Pathologies of the Modern Class Action: A Normative and Empirical Analysis*, 62 Fla. L. Rev. 617, 623 (2010) (quoted with approval in the concurring opinion of the Honorable Edith H. Jones in *Klier v. Elf Atochem North-America, Inc.*, 658 F.3d 468, 481 (5th Cir. 2011)).

In *Tyson Foods, Inc. v. Bouaphakeo*, 577 U.S. ___, 136 S. Ct. 1036, 1046 (2016), the petitioners requested

that this Court "announce a broad rule against the use in class actions of what the parties call representative evidence." This Court applied the Rules Enabling Act to reject this argument, finding that:

> In a case where representative evidence is relevant in proving a plaintiff's individual claim, that evidence cannot be deemed improper merely because the claim is brought on behalf of a class. To so hold would ignore the Rules Enabling Act's pellucid instruction that use of the class device cannot "abridge . . . any substantive right." 28 U.S.C. § 2072(b).

136 S. Ct. at 1046. *See also Broussard v. Meineke Disc. Muffler Shops, Inc.*, 155 F.3d 332, 345 (4th Cir. 1998) (concluding that "[i]t is axiomatic that the procedural device of Rule 23 cannot be allowed to expand the substance of the claims of class members"). It follows that the Rules Enabling Act also prevents federal courts from: (1) applying a remedy in a claim pursued as part of a class action unless that remedy could be used by an individual bringing the same claim and (2) using Rule 23 to reduce the substantive rights of class members. Using a *cy pres* remedy to extinguish the claims of absent class members – in this case, more than 100 million plaintiffs, with essentially no notice – necessarily reduces class members' substantive rights, as discussed in more detail below.

3. The use of *cy pres* in class action litigation substitutes charitable payments for the remedies available under the substantive law.

This Court has held that the Rules Enabling Act limits the ability of the federal courts to use the Rule 23 procedures to approve the settlement of a class action lawsuit. *See Amchem*, 521 U.S. at 628-629 (finding that district court could not use Rule 23(e) settlement approval to create "nationwide administrative claims processing regime . . . [for] compensating victims of asbestos exposure" because of limitations of Rules Enabling Act).[7] *See also In re General Motors Corp. Engine Interchange Litigation*, 594 F.2d 1106, 1135-1136 (7th Cir. 1979) (finding that district court's approving settlement that dismissed claims of non-consenting class members "contravene[d] the Rules Enabling Act . . . by abridging the substantive rights of those who did not accept the settlement offer"). This Court should now hold that the Rules Enabling Act prevents the district court's approval of a settlement that substitutes the *cy pres* remedy for the remedy existing under the substantive law for two reasons.

First, the substantive law includes the remedy for its violation. All substantive law consists of two

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[7] Despite this decision, some circuit courts have concluded that the Rules Enabling Act simply does not apply to the district court's approval of a settlement. *See In re: Motor Fuel Temperature Sales Practices Litigation*, 872 F.3d 1094, 1116 (10th Cir. 2017); and *Marshall v. National Football League*, 787 F.3d 502, 511 n.4 (8th Cir. 2015).

elements: prohibition and enforcement. *Redish*, *supra*, 62 Fla. L. Rev. at 644. By enacting a law, a legislature chooses among different enforcement methods, such as compensation, punitive damages, civil fines and criminal punishment. *Id.* at 645. When a district court approves a *cy pres* settlement, the court is substituting a fine made payable to a charity for the substantive law's remedy, which is usually compensation paid to the injured persons. *Id.* at 645-646. In other words, the use of *cy pres* modifies the substantive law because it punishes the defendant with a fine rather than compensates the allegedly injured persons.[8]

The proponents of *cy pres* do not dispute this. In fact, they argue that using *cy pres* to punish a defendant is a feature, not a bug. After the 1966 revisions to Rule 23, a class action judgment "binds all class members who have not acted to exclude themselves from the suit." Comment, 39 U. Chi. L. Rev. at 448.[9] Despite being bound by the judgment, many class members do not take any action at all with respect to the class action lawsuits "even after a judgment or settlement in their favor has been reached and do not attempt to collect their shares of the recovery." *Id.* Because many class members do not make a claim, a portion of the

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[8] This same principle applies if the use of *cy pres* replaces a criminal penalty or changes the recipient of the fine from a governmental entity to a private charity.

[9] *See also Amchem*, 521 U.S. at 614-15 ("Rule 23(b)(3) added to the complex-litigation arsenal class actions for damages designed to secure judgments binding all class members save those who affirmatively elected to be excluded.").

sums set aside to pay the judgment or the settlement is not claimed and collected.

If an individual plaintiff does not take steps to enforce that judgment, the plaintiff does not recover anything. Therefore, the defendant retains money that the plaintiff has chosen not to collect, which was the ultimate result in *Van Gemert*. 739 F.2d at 736-738. The 1972 Comment characterized the defendant's retaining the unclaimed funds as "unjust enrichment" and argued that "distribution to the next-best class would be preferable." 39 U. Chi. L. Rev. at 459. Circuit courts approving of *cy pres* distributions of unclaimed funds use similar justifications. *In re Baby Prod. Antitrust Litig.*, 708 F.3d 163, 172 (3d Cir. 2013) ("Reversion to the defendant risks undermining the deterrent effect of class actions by rewarding defendants for the failure of class members to collect their share of the settlement.").

The same risk applies in any lawsuit where the plaintiff does not enforce the judgment or cash the settlement check. But, it is only in lawsuits certified as class actions under Rule 23 that federal courts use the *cy pres* remedy to punish defendants. Therefore, a procedural device is being used to change the substantive remedy enacted to deter persons from performing the acts prohibited by that substantive law.

Second, class action settlements differ from individual settlements in two important ways. One, the settlement negotiations are not conducted by all the parties that will be bound by the outcome of the case.

Instead, they are only conducted by the named parties, some of whom are charged with acting on behalf of all class members. Therefore, all the parties are not expressly consenting to replace compensatory payments with payments to charities. Two, district courts must approve class action settlements before they become binding upon the entire class and discharge the defendant's liability to that class. Fed. R. Civ. P. 23(e). As the Fifth Circuit has explained:

> A class settlement is not a private agreement between the parties. It is a creature of Rule 23, which authorizes its use to resolve the legal claims of a class "only with the court's approval." . . . In granting approval, the court must, as always, adhere to the precepts of Article III and the Rules Enabling Act. While a "welcome byproduct" of deciding cases or controversies on a class-wide basis, the goal of global peace does not trump Article III or federal law. . . . Courts do not have the authority to create a cause of action (and their corresponding subject-matter jurisdiction over it) and then give peace with regard to that cause of action.

In re Deepwater Horizon, 732 F.3d 326, 343 (5th Cir. 2013).

The district court is permitted to approve a class action settlement only after giving "notice in a reasonable manner to all class members" and holding a hearing. Fed. R. Civ. P. 23(e)(1), (2) and (5). Therefore, the federal district court is performing an adjudicative act when it determines that a particular settlement is

"fair, reasonable and adequate" under Rule 23(e)(2). Accordingly, if the district court substitutes a new remedy – *cy pres* – in whole or in part for the authorized remedy, then the district court's application of Rule 23(e) violates the Rules Enabling Act just as creating a new remedial process violates this Act. *Amchem*, *supra*, 521 U.S. at 628-629.

This case presents a good example of both problems. First, the primary cause of action that Plaintiffs alleged was that Google had violated the federal Stored Communications Act, 28 U.S.C. § 2702. In this statute, Congress outlawed specified conduct. *Id.* Congress also authorized – as part of the substantive law that it was enacting – the following remedies for violations of this Act: (a) preliminary and injunctive relief, (b) actual damages up to $1,000 per violation and (c) reasonable attorney fees. 18 U.S.C. § 2707(b), (c). But the settlement neither enjoins Google from any violation of this Act nor requires Google to pay any actual damages to the persons harmed.[10]

Instead, as suggested by the Comment, the settlement substitutes the *cy pres* remedy for all of the remedies that Congress authorized. 39 U. Chi. L. Rev. at 452. In its decision affirming the district court approval of the *cy pres* distributions, the Ninth Circuit found that *cy pres*-only settlements are "appropriate where the settlement fund is 'non-distributable'

[10] The attorney fees were included in the settlement pursuant to the class action procedures under Rule 23(h), not 18 U.S.C. § 2707(b)(3). *See* District Court Order Approving Settlement, App. 52-58.

because 'the proof of individual claims would be burdensome or distribution of damages costly.'" *In re Google Referrer Header Privacy Litigation*, 869 F.3d at 741-742 (citing *Lane v. Facebook, Inc.*, 696 F.3d 811, 819 (9th Cir. 2012)). It then found that the use of the *cy pres* remedy is consistent with the requirements of class certification because certification is proper when "the recovery on an individual basis would be dwarfed by the cost of litigating on an individual basis. . . ." *Id.* at 743.

In other words, the Ninth Circuit implicitly held that federal courts may use one federal rule (authorizing approval of class action settlements) to modify the remedy created by Congress because a second federal rule (authorizing class certification) makes it infeasible to apply the remedy created by Congress. This Court should find that doing so violates the clear language of the Rules Enabling Act, as previously applied by *Amchem* and *Tyson*.

C. This Court should find that federal courts may only use the *cy pres* remedy when the substantive law allows the use of this remedy.

The states have authorized the use of the *cy pres* remedy for charitable trusts under limited circumstance because they concluded that its use was equitable under those circumstances. The proponents of using the *cy pres* remedy in class actions raise legitimate concerns. So do the opponents of the use of *cy pres* in class actions. The Rules Enabling Act prohibits the

federal courts from using the procedures under Rule 23 to resolve the competing concerns raised by these parties to determine when the *cy pres* remedy can be used in class action litigation.

There are, however, two situations where federal courts are permitted to use *cy pres* in class actions. First, a few states have also authorized the use of the *cy pres* remedy in class actions pending in those courts. *See* 4 Rubenstein, *Newberg on Class Actions* § 12:35 (5th ed.) (stating that "at least a dozen states" have a statute authorizing the use of *cy pres* payments in class actions). Depending upon the precise circumstances, federal courts might be authorized to use *cy pres* in class actions that apply one of these state's substantive laws.

Second, Congress has authorized the use of the *cy pres* remedy in one limited circumstance in class action litigation. The Class Action Fairness Act of 2005 governs settlements that involve the distribution of coupons to class members. 28 U.S.C. § 1712. It expressly authorizes the federal courts to "require that a proposed settlement agreement provide for the distribution of a portion of the value of unclaimed coupons to 1 or more charitable or governmental organizations, as agreed to by the parties." 28 U.S.C. § 1712(e).

All legislation involves compromises, and the Class Action Fairness Act of 2005 is no exception. One of the concerns raised by Petitioners in this case, and by other opponents of *cy pres* payments in class actions in general, is that they can be used to inflate the

attorney fees that are recovered by class counsel. Petitioners' Merits Brief, pp. 16, 22-23, 28-29. When Congress passed the Class Action Fairness Act, it decided that "[t]he distribution and redemption of any proceeds under this subsection shall not be used to calculate attorneys' fees under this section." 28 U.S.C. § 1712(e).[11] Under the federal Constitution and the Rules Enabling Act, this is precisely how this type of conflict between competing principles should be resolved. In the absence of such legislative action, however, the Rules Enabling Act prohibits the interpretation of Rule 23 to allow federal courts to substitute *cy pres* charitable distributions in place of the remedies that are authorized by the applicable substantive law.

CONCLUSION

Google is certainly free to donate its own money to any of the charities designated as *cy pres* recipients. But, federal courts are not generally authorized to extinguish the rights of private party litigants by substituting the *cy pres* remedy for the remedies that exist under applicable statute or the common law. Therefore, this Court should reverse the judgment below and hold that federal courts cannot approve use of the *cy pres*

[11] This Act also provides detailed instruction on how attorney fees are to be calculated and awarded. 28 U.S.C. § 1712(b), (c).

remedy in class actions except when the federal courts are expressly authorized to do so.

Respectfully submitted,

C. THOMAS LUDDEN
Counsel of Record
KAREN A. SMYTH
LIPSON NEILSON P.C.
3910 Telegraph Road, Suite 200
Bloomfield Hills, Michigan 48302
(248) 593-5000
tludden@lipsonneilson.com